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Supreme Court, U.S.
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No. 03-1707

IN THE

# Supreme Court of the United States

RUSSELL ALLEN NORDYKE, *et al.*,

*Petitioners*

v.

MARY V. KING, *et al.*,

*Respondents*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF AMICUS CURIAE OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., IN SUPPORT OF PETITIONERS AND IN SUPPORT OF REVERSAL

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## QUESTION PRESENTED

Do the individual rights guaranteed by the Second Amendment to the United States Constitution apply through the Fourteenth Amendment to the States?

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## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Rifle Association of America, Inc. ("NRA") is a New York not-for-profit membership corporation founded in 1871. NRA has 4.2 million individual members and 10,700 affiliated members (clubs and associations) nationwide. NRA's purposes, as set forth in its Bylaws, include the following:

> To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens . . . .

NRA's interest in this case stems from the fact that large numbers of NRA members reside in the States encompassed within the Ninth Circuit and will be affected by

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party to this dispute authorised this brief in whole or in part and no person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief. The parties have orally consented to the filing of this brief; written consents will be filed upon receipt.

any ruling this Court may make concerning the meaning of the right of the people to keep and bear arms as provided in the Second Amendment and whether this right is protected from State infringement under the Fourteenth Amendment.

## ARGUMENT

### INTRODUCTION

This case concerns the validity of Alameda County Code § 9.12.120(b), which provides: "Every person who brings onto or possesses on County property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor." Petitioners challenged this prohibition as a violation of the First Amendment right to free speech based on the legislative motive to ban gun shows and the Second Amendment right to keep arms as applied to the States by the Fourteenth Amendment. A panel of the court of appeals upheld the ordinance, concluding that it was bound by the prior panel decision in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), *cert. denied*, 519 U.S. 912 (1996), which held that the right to "bear arms" is not an individual right. Despite the right to "keep" arms not being an issue in *Hickman*, the panel in the case at bar viewed its holding as extending to the right to "keep" arms.

Further, although the panel in the instant case did not reach the Fourteenth Amendment issue, the Ninth Circuit, in a prior panel decision, *Fresno Rifle & Pistol Club v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992), held that the Second Amendment is not incorporated into the Fourteenth Amendment. Thus, the panel in the case at bar would have been bound by that decision.

While *amicus curiae* NRA agrees that the ordinance violates the First Amendment right to free speech as applied to the States by the Fourteenth Amendment, this brief is limited to whether the Second Amendment applies to the States through the Fourteenth Amendment.

## THE SECOND AMENDMENT APPLIES TO THE STATES THROUGH THE FOURTEENTH AMENDMENT

*Fresno Rifle & Pistol Club v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992), held that the Second Amendment is not incorporated into the Fourteenth Amendment so as to protect the right to keep and bear arms from State infringement. While there is no conflict between the circuits on this issue, the issue of applicability of the Second Amendment to the States through the Fourteenth Amendment is an important question of federal constitutional law that has not been, but should be, settled by this Court.

*Fresno Rifle & Pistol Club* is flawed in two respects. First, while this Court has held that the Bill of Rights does not *directly* apply to the States, this Court has left open the question whether the Fourteenth Amendment protects the right to keep arms as guaranteed by the Second Amendment against State infringement. Second, *Fresno Rifle & Pistol Club* ignores the fact that over two-thirds of the same Congress that passed the Amendment declared that the rights to "personal liberty" and "personal security" include "the constitutional right to bear arms."

In *Miller v. Texas*, 153 U.S. 535, 538-39 (1894), this

Court noted that, "if the Fourteenth Amendment limited the power of the States as to such rights [*i.e.*, the rights to bear arms and against warrantless searches] as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court." This Court would not hear assignments of error not timely made in the court below. *Id.*

*Miller v. Texas* held that the Second and Fourth Amendments did not *directly* apply to the states. *Id.* at 538, citing *Barron v. Baltimore*, 32 U.S. 243, 250-51 (1833) (Fifth Amendment just-compensation clause did not apply directly to States) and *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876) (stating in *dictum* that "the first amendment . . . was not intended to limit the powers of the State governments . . . but to operate upon the National government alone"; same with Second Amendment).[2] *Presser v. Illinois*, 116 U.S. 252 (1886), held that a prohibition on unlicensed armed parades in cities and towns "do[es] not infringe the right of the people to keep and bear arms," adding in *dictum* that the First and Second Amendments are "a limitation only upon the power of Congress and the National Government, and not upon that of the states." 116 U.S. at 265. *Cruikshank* and *Presser* did not address whether the Fourteenth Amendment incorporates the

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[2] *Fresno Rifle & Pistol Club* cites *Cruikshank* as having "held" that the Second Amendment does not constrain the States. 965 F.2d at 729. Yet no State action was even involved in *Cruikshank*, which concerned the prosecution of *private individuals* for violation of freedmen's rights to assemble and bear arms. 92 U.S. at 544-45. *Cruikshank* held that private action was not constrained by the Fourteenth Amendment. *Cruikshank's* comment about the First Amendment (and hence the Second) was "*dictum*." *Collins v. Handyman*, 341 U.S. 651, 660 (1950).

First and Second Amendments so as to limit state action.[3]

*Fresno Rifle & Pistol Club* held that *Cruikshank* and *Presser* applied even though they mention only the *direct* application of the First and Second Amendments to the States. It stated that, since *Miller v. Texas* predated the first incorporation case,[4] "there is no reason to believe that *Miller* left open the incorporation question any more than *Cruikshank* or *Presser*." 965 F.2d at 730. Yet *Miller v. Texas* explicitly stated that it is *not* deciding whether the Fourteenth Amendment protects the right to keep and bear arms. 153 U.S. at 538.

The Fifth Circuit in *Emerson v. United States*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002)

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[3] *Presser* did observe, however, that:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and in view of this prerogative of the general government, as well as of its general powers, *the States cannot, even laying the constitutional provisions in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United State of their rightful resource for maintaining the public security and disable the people from performing their duty to the general government.*

116 U.S. at 265.

[4] *Chicago, B.& Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

commented:

> As these holdings all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and as they ultimately rest on a rationale equally applicable to all those amendments, none of them establishes any principle governing any of the issues now before us.

270 F.3d at 221 n.13.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992), this Court seemingly agreed that the right to keep arms was protected by the Fourteenth Amendment when it rejected the view that, in determining what rights were protected by the Fourteenth Amendment, "liberty encompasses no more than those *rights already guaranteed to the individual* against federal interference *by the express provisions of the first eight Amendments* to the Constitution." (emphasis added). Given that the Second Amendment guarantees an individual right,[5] it would be illogical not to incorporate it into the

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[5] See *e.g.*, *Emerson*, *supra*; *Runnebaum v. NationsBank of MD*, 123 F.3d 156, 176 (4th Cir. 1997) (*en banc*)("*individuals* have the constitutional right to peaceably assemble, *see* U.S. Const. amend. I; and to 'keep and bear Arms,' U.S. Const. amend. II."); *Gilbert Equipment Co., Inc.* v. *Higgins*, 709 F. Supp. 1071 (S.D. Ala. 1989), *aff'd*, 894 F.2d 412 (11th Cir. 1990) (*mem*)(Second Amendment "guarantees to all Americans 'the right to keep and bear arms'"); *United States* v. *Swinton*, 521 F.2d 1255 (10th Cir.

Fourteenth Amendment as this Court has done with other guarantees of the Bill of Rights.

The second major flaw in *Fresno Rifle & Pistol Club* is that it rejected the rule that "in interpreting a constitutional provision, the fundamental principle of construction is to give the provision the effect intended by the framers and the people adopting it." *Tom v. Sutton*, 533 F.2d 1101, 1105 (9th Cir. 1976). This Court "has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1, 5 (1964).

*Fresno Rifle & Pistol Club* disregarded these principles by refusing to consider "remarks by various legislators during passage of the Freedmen's Bureau Act of 1866, the Civil Rights Act of 1866, and the Civil Rights act of 1871." 965 F.2d at 730. Further, far more was involved than "remarks." For instance, Senator Jacob M. Howard, in introducing the Fourteenth Amendment to the Senate in 1866, referred to:

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1975)("there is no *absolute constitutional right of an individual* to possess a firearm"); *United States* v. *Day*, 476 F.2d 562 (6th Cir. 1973)("there is no *absolute* right of an individual to possess a firearm"); *United States* v. *Wiley*, 309 F.Supp. 141, 145 (D. Minn.), *aff'd*, 438 F.2d 773 (8th Cir. 1971)(felons are "a separate class whose *individual right* to bear arms may be prohibited"); and *Cases* v. *United States*, 131 F.2d 916 (1st Cir. 1942), *cert. den. sub nom.*, *Velazquez* v. *United States*, 319 U.S. 770 (1943)(federal statute "undoubtedly curtails to some extent *the right of individuals* to keep and bear arms").

> the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

Quoted in *Duncan v. Louisiana*, 391 U.S. 145, 166-67 (1968) (Black, J., concurring).

*See also* S. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Praeger Publishers, 1998); A. Amar, "The Bill of Rights and the Fourteenth Amendment," 101 YALE L.J. 1193, 1242-45, 1261-66 (1992);R. Cottrol & R. Diamond, "The Second Amendment: An Afro-Americanist Reconstruction," 80 GEORGETOWN L.J., No. 2, 309, 342-49 (1991).

The same two-thirds of Congress which passed the Fourteenth Amendment also enacted a statute protecting from State infringement the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate, real and personal, including the constitutional right to bear arms". Freedmen's Bureau Act, §14, 14 Stat. 176 (1866). *See Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 397-98 (1978) (opinion of Marshall, J.) (rights set forth in the Freedmen's Bureau Act were dispositive of Congress' intent in Fourteenth Amendment).

The Fourteenth Amendment protects from state infringement the "indefeasible right of personal security,

personal liberty and private property." *Griswold v. Connecticut*, 381 U.S. 479, 485 n. (1965). No state may commit "a violation of [the] constitutional right to personal security, a liberty interest protected by the fourteenth amendment." *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989). *See also United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1220 (9th Cir. 1988), *rev'd on other grounds* 494 U.S. 259 (1990) ("The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.") (quoting 2 J. Kent, COMMENTARIES 1 (1827)).

In light of the above, it must be concluded that the Ordinance, by prohibiting mere possession of a firearm on County property, violates the right to keep arms, a right embodied in the right to personal security, guaranteed by the Second Amendment as applied to the states by the Fourteenth Amendment.

## CONCLUSION

The Court should grant Petitioners' petition for a writ of certiorari.

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